THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

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THE RECORD is published at the House of the Association, 42 West 44th Street, New York 36.

Volume 10 — OCTOBER 1955 — *Number 7*

Association Activities

THE SPECIAL COMMITTEE on the Federal Loyalty-Security Program, Dudley B. Bonsal, Chairman, has begun holding conferences on the subject with prominent authorities in the field.

The Committee is conducting a professional, non-partisan study of the Federal Loyalty-Security Program. The paramount requirements of national security as well as the importance of preserving the traditional rights of the individual citizen are recognized as combined aims of the program by the Committee. It will consider what changes in the program may be useful to achieve both of these aims.

Conferences will be held with a wide range of informed persons on the program and its operation. The conferences will be in Washington, New York and other cities. Principal attention will be given to the bearing of the program on the civil service and on employment in industry.

The members of the Committee are Dudley B. Bonsal, Chairman, Henry J. Friendly, Harold M. Kennedy, George Roberts and Whitney North Seymour, New York; Richard Bentley, Chicago; Frederick M. Bradley, Washington, D. C.; Monte M. Lemann, New Orleans; and John O'Melveny, Los Angeles. The staff includes Professor Elliott E. Cheatham of Columbia Uni-

versity, director, Professor Jerre S. Williams of the University of Texas, associate director, and John R. Miller of Chatham, New Jersey.

The study is made possible by a grant from The Fund for the Republic, Inc. The study will be carried out by the Association's Committee, which will have full responsibility for the conduct of the study and for any recommendations which may be made.

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A CAPACITY audience heard Dag Hammarskjold speak at the House of the Association on "Law and the United Nations." Mr. Hammarskjold's lecture is published in this issue of THE RECORD. Preceding Mr. Hammarskjold's address Sir Alfred Thompson Denning, a Lord Justice of Appeal, spoke briefly.

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THE PRESIDENT of the Association, Whitney North Seymour, Dean K. Worcester, Francis H. Horan and Bethuel M. Webster represented the Association as delegates to the Judicial Conference of the Second Circuit held in Hartford September 8–10.

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DURING the 1955 session of the Legislature, The New York State Temporary Commission on the Courts, of which Harrison Tweed is the Chairman, made an encouraging start on its comprehensive program for the improvement of the administration of justice. The Commission's most important accomplishment was the passage of a bill to set up a state-wide Judicial Conference to administer the courts of the State. The Conference is composed of the Chief Judge of the Court of Appeals, as Chairman; and the Presiding Justice of each of the four Appellate Divisions of the Supreme Court, as well as one trial Justice from each of the four Departments—a total of nine Judges. This body will comprise the policy-making group, and it will be assisted by a State Administrator and staff. The Conference has announced the designation

of former Supreme Court Justice John B. Johnston as the new State Administrator.

In each of the four Departments, in addition, there will be a Departmental Committee consisting of the Presiding Justice in that Department, as Chairman, the Supreme Court Justice serving on the Judicial Conference, one other Supreme Court Justice from each District in the Department, and Judges from other courts and members of the Bar. Serving these Committees in each Department will be a Deputy Administrator.

The Conference and the Departmental Committees will work to coordinate court organization, jurisdiction, procedures, rules, administrative, clerical, fiscal and personal practices and collect statistics and find means for reducing court congestion.

The Assembly passed this measure by a vote of 135 to 12 and the Senate passed it by a vote of 53 to 3. With the Governor's signature, it became law on April 29.

The second area on which the Commission made recommendations was that of calendar congestion.

Five of the twelve proposals dealt with immediate steps to combat this congestion.

The first of these was a bill which would allow plaintiffs to transfer their cases to lower courts without obtaining the written consent of the defendant, as has been required up to now. This would be done, of course, only in those cases in which the defendant would lose none of his rights as a result of the action. This was passed by both Houses of the Legislature and signed by the Governor.

The second bill, which was enacted into law, would allow attorneys to establish liens on cases by filing a notice of claim on the party against whom the claim is being made, rather than by instituting suit.

The third bill in this area called for an increase of 21 in the number of Supreme Court Justices in the State, with the additional judicial manpower being allocated to those areas needing it most to attack calendar congestion. The bill, however, was not reported out of Committee.

In the same category—not reported out of Committee—was a bill to establish a formula for more uniform travel allowances for Supreme Court Justices.

The fifth proposal would have amended two sections of the Workmen's Compensation Law (two bills were required here, although they were, in effect, aimed at one objective) in order to provide for easier and more equitable settlements of cases brought against "third parties"—persons other than employees—involved in proceedings under this law. The Governor vetoed these bills.

The remainder of the Commission's legislative program consisted of six bills involving youthful offenders.

The Commission recognized, very early in its existence, that the problem of the rising rate of youthful offenses is one of the gravest facing the State today, and that the court system, as it related to this disturbing phenomenon, needed to be better organized to meet it.

After many months of study of the problem the Commission issued a proposal for the creation of "Youth Courts" as part of the existing county court system, to specialize in swift and uniform handling of cases involving offenses by those between the ages of 16 and 21. The Commission also realized, at the same time, that any such court would have to have better tools with which to work, in the way of improved probation services and institutional facilities, than are presently available. Embodied in the legislative program were recommendations for the improvement and expansion of auxiliary services to the courts.

In January, the Commission sponsored two bills to establish the "Youth Court." One of these would actually create the new court. The other provided for amendments to existing laws which would have to be changed before the "Youth Court" could be instituted. The Commission did not press for passage of this legislation, feeling that its value, at this time, is for legislative study rather than an immediate enactment. Neither of these bills was reported out of Committee. However, they served to focus legis-

lative attention upon the proposal and should inspire thoughtful consideration of it for the future.

The four remaining bills of the youthful offender series, however, were passed and were approved by the Governor on April 22.

These new laws provide for:

1. A pilot project expanding the State probation services with an appropriation of $110,000;
2. A pilot project for the establishment of work camps for minor offenders, with an appropriation of $135,000;
3. A third pilot project, establishing foster homes and hostels for minor offenders, with an appropriation of $50,000; and
4. The establishment of a Division of Youth in the State Department of Correction, with an appropriation of $12,000.

This completes the summary of the Commission's legislative program for 1955. The Governor and the Legislature, by appropriating for the continuation of the Commission for the customary one-year period, have made possible the pursuit of other projects for court improvement.

The most important project which the Commission expects to deal with during the coming year is that of recommending ways in which the State can make a modern organization out of what the Commission called, in its annual report for 1955, "the complex and archaic melange of courts and types of courts" which exist today in New York.

To approach this task a Subcommittee on Modernization and Simplification of the court structure, headed by Louis M. Loeb, plans to submit a proposal which has been considered by interested groups during the summer, with public hearings scheduled for later in the year. On the basis of views presented at those hearings and meetings, the Commission should be able to make recommendations on this matter to the 1956 Legislature.

The Commission plans to get underway, during the coming year, a project for the simplification and renovation of New York's complicated court practices and procedures, using the voluntary services of a group of experts in this field.

Also before the Commission are considerations of legal costs, questions pertaining to the jury system and the matter of recommendations on the question of contributory versus comparative negligence in personal injury cases.

The members of The Temporary Commission, in addition to Mr. Tweed, are: Louis M. Loeb, of Mount Kisco, Vice Chairman; Assemblyman Leonard Farbstein, New York; Senator Louis L. Friedman, Brooklyn; Murray I. Gurfein, New York; Senator John H. Hughes, Syracuse; Assemblyman Justin C. Morgan, Buffalo; James M. Nicely, New York; Lewis C. Ryan, Syracuse; and Whitney North Seymour, New York. James O. Moore, Jr., Buffalo, was a member of the Commission prior to accepting appointment as State Solicitor General earlier this year.

THE EXECUTIVE Committee at its June meeting approved a resolution of the Committee on the Bill of Rights, Fifield Workum, Chairman, directing that "an invitation be inserted in THE RECORD of the Association urging members of the Association having an interest in the maintenance and strengthening of the basic civil rights of all citizens, to notify the Executive Secretary of the Association of their willingness to consider lending their professional assistance in the determination of issues in this field, particularly in the appellate courts, as counsel or otherwise; and that the names of members indicating such willingness be made available to individuals and responsible organizations upon request in the discretion of the Executive Secretary."

THE COMMITTEE on Federal Legislation, Arthur L. Newman, Chairman, distributed to members of Congress a comprehensive report on the Reed-Walter resolutions which provide for a new

method of amending the Constitution. Additional copies of the report are available on application to the Executive Secretary.

AT THE request of Presiding Justice Peck, the President appointed a Special Committee to cooperate with Justice Peck in setting up a Family Part of the Supreme Court and to administer a grant from the Doris Duke Foundation which enables the new Family Part to secure the services of social workers. The Chairman of the Committee is Merrell E. Clark, Jr. and the members of the Committee are: Dr. Howard Reid Craig, John F. Dooling, Jr., Samuel M. Gold, Theodore Kiendl, Jr., Madeleine Lay, Katherine McElroy, Richard G. Moser and Maurice Rosenberg.

BY APPOINTMENT of the President, Dudley B. Bonsal, Ernest Angell, Eli Whitney Debevoise and Bethuel M. Webster represented the Association at the International Congress of Jurists sponsored by the International Commission of Jurists held in Athens, Greece, June 13–18. Elsewhere in this issue of THE RECORD is Mr. Bonsal's description of the conference.

THE IXTH CONFERENCE of the Inter-American Bar Association will be held in Dallas, Texas, April 14–21, 1956. Copies of the program for the conference may be obtained from William Roy Vallance, Secretary General, 1129 Vermont Avenue, Washington, D. C.

THE AUGUST 9 issue of the magazine, "Pageant" carried an article entitled, "A Family Lawyer Speaks Out." The article points out that the advantages of having a family lawyer are similar to those of having a family doctor.

OCEANA PUBLICATIONS has announced a new series of books to be known as "The Docket Series," the first volume of which, "The Holmes Reader," edited by Julius J. Marke, has recently been released. The series is designed to bring, according to the publishers, the "essence of American law and jurisprudence, as seen through the decisions, commentaries and critiques by and on our eminent jurists." Subsequent volumes will be "The Freedom Reader," "The Marshall Reader" and "The Common Law Reader."

The Calendar of the Association for October and November

(As of September 29, 1955)

October	3	Meeting of Subcommittee of Municipal Court Committee Dinner Meeting of Committee on Professional Ethics
October	4	Dinner Meeting of Special Committee on Federal Loyalty-Security Program Dinner Meeting of Committee on Administration of Justice Dinner Meeting of Committee on International Law Meeting of Judiciary Committee Meeting of Committee on Legal Aid Dinner Meeting of Committee on Medical Jurisprudence
October	5	Dinner Meeting of Executive Committee Dinner Meeting of Committee on Municipal Court Meeting of Section on Wills, Trusts and Estates
October	6	Meeting of Committee on Lawyers Placement Bureau Luncheon Meeting of Committee on Modern Courts Dinner Meeting of Committee on Post-Admission Legal Education Meeting of Young Lawyers Committee
October	10	Dinner Meeting of Committee on Law Reform Dinner Meeting of Committee on Military Justice
October	13	Dinner Meeting of Committee on Taxation
October	17	Dinner Meeting of Committee on Domestic Relations Court Meeting of Library Committee
October	18	*Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
October	19	Meeting of Committee on Admissions Meeting of Committee on Arbitration Meeting of Committee on Foreign Law Dinner Meeting of Committee on Courts of Superior Jurisdiction

October	21	Afternoon and Dinner Meetings of Special Committee on Federal Loyalty-Security Program
October	24	Luncheon and Dinner Meetings of Special Committee on Federal Loyalty-Security Program Dinner Meeting of Committee on Administrative Law
October	25	Meeting of Art Committee Luncheon Meeting of Special Committee on Federal Loyalty-Security Program Dinner Meeting of Committee on Insurance Law
October	26	*Round Table Conference, 8:15 P.M. Guest to be announced.*
October	27	*Fourteenth Annual Benjamin N. Cardozo Lecture, 8:00 P.M. Speaker—Harrison Tweed, Esq. Buffet Supper, 6:15 P.M.*
October	28	*Dance. Sponsorship Entertainment Committee*
October	31	Dinner Meeting of Committee on Medical Jurisprudence
November	1	Dinner Meeting of Committee on Bill of Rights
November	2	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates
November	9	Meeting of Committee on Domestic Relations Court Dinner Meeting of Committee on Professional Ethics
November	16	Meeting of Committee on Admissions Dinner Meeting of Committee on Courts of Superior Jurisdiction Dinner Meeting of Committee on Foreign Law
November	17	New York City Regional Moot Court Competition. Sponsorship Young Lawyers Committee
November	18	New York City Regional Moot Court Competition. Sponsorship Young Lawyers Committee
November	21	Meeting of Library Committee
November	22	*Lecture by Hon. Samuel H. Hofstadter, Justice of Supreme Court of State of New York, 8:00 P.M. Buffet Supper, 6:15 P.M.*

Report of the President

1954–1955

We are entering the 85th year since the charter of this Association was authorized by the legislature of the State of New York. A president when reviewing, as I have just done, the work of some 60 committees, must be conscious of that long history and alert to the responsibilities which this heritage imposes. I believe we can be proud of our work. I make this claim with propriety because all must know that our success depends on what our committees accomplish and upon the support of their work by an active and interested membership. For that reason I consider this report of mine but a preface to the published reports of the committees and hope that it will lead others to read those reports with the interest and pride with which I have done.

The establishment of The Temporary Commission on the Courts, under the Chairmanship of Mr. Tweed, presented this Association and the Bar in general with an unique opportunity to make a fundamental attack on the delay, inefficiency and expense that have hampered the administration of justice in this state. What has this Association done to assist the Commission to find the right solutions to these problems? What have we done to support before the legislature and in this community the solutions put forward by the Commission?

With the aid of generous grants to the Association by Mr. Laurence Rockefeller, Mr. John D. Rockefeller, III, and the New York Foundation we have been able to do the following.

We have published "Children and Families in the Courts of New York City." This study, prepared by professor Walter Gellhorn for the Association's Special Committee on the Study of the Administration of Laws Relating to the Family, is a carefully documented and to me irrefutable argument for a single integrated court to handle the problems that result from the deterioration of the family unit and the delinquency of children. The book has been widely distributed to community groups, the

Legislature and the judiciary and has been favorably received. This is important because in its most recent report, "A Proposed Simplified State-Wide Court System," the Temporary Commission has recommended (Page 3) a family and children's division of the proposed court of general unlimited jurisdiction. Such a division, properly staffed, would achieve the kind of court for which Professor Gellhorn's study demonstrates a pressing need. We must do more, however, than to rest on this study. We must dramatize to the public the urgency of this reform. This brings me to a second step we have taken to further the work of the Temporary Commission.

I refer, of course, to our support of the newly organized "Committee for Modern Courts." The Committee is a state-wide organization composed of leading laymen under the energetic and able Chairmanship of Mr. Edwin F. Chinlund, Vice-president and Treasurer of R. H. Macy & Company. Its purpose is to bring home to the citizen, and through him to the Legislature, the importance of improving the administration of justice *now*. Encouraging support for the Committee has come from such groups as the League of Women Voters, the Chamber of Commerce and other influential groups. This is the kind of support that will be invaluable to The Temporary Commission in resisting the inevitable attack on its program by those representing parochial interests. I hope, moreover, that in the Committee for Modern Courts we have found a medium through which to marshal public support for other causes in which we are greatly interested.

In February of 1955 we published and distributed widely a definitive, up to date, and realistic study of the archaic, confusing and wasteful way in which our courts are actually administered. Appropriately entitled "Bad Housekeeping" and bound in a red cover, the book demonstrated by facts, figures and diagrams the dangers of muddling along as we are now. Its publication was enthusiastically acclaimed by the press throughout the state and had something to do, we believe, with the passage of the legislation which establishes for the first time in this state a Judicial Conference, headed by the Chief Judge of the Court of Appeals,

charged with the duty of administering the courts in an efficient and responsible way.

I must confess that the Conference was not given by the Legislature all the powers which we believe so important an agency should have. We take comfort, however, in the fact that Chief Judge Conway is supporting the Conference with the prestige of his high office and that the Conference has selected as its Administrator Judge John B. Johnston, a vigorous and experienced former Justice of the Supreme Court. We will watch the operation of the Conference with close interest and shall not hesitate to press for additional grants of authority if the Conference should need such support.

With the publication of The Temporary Commission's plan for a complete reorganization and integration of the courts of the state our Association is presented with an opportunity for the improvement of the state's judicature that it has not had in its 85 years of existence and may never have again. The plan of the Commission is a bold and intelligent attack on an archaic and confusing court structure. It represents not only the best modern thinking on court organization but reflects the practical wisdom of the experienced lawyers and legislators on the Commission.

Because the Commission's plan goes to the root of our difficulties and provides a comprehensive solution it will no doubt be attacked obliquely by those having parochial and what they consider vested interests in the present fragmentation of jurisdiction. The danger is not in frontal attacks on the Commission's conception of a statewide system; the danger is in the attempts that will be made to nibble away at parts of the plan. The Association must assist the Commission in resisting such attempts by keeping before the public and the Legislature the larger issue involved. Our Special Committee on Studies and Surveys of the Administration of Justice is aware of this obligation as is the Committee for Modern Courts. They are developing materials and methods which I hope will demonstrate the Association's and my confidence in them is not misplaced.

We are aware, of course, that because of constitutional prob-

lems, The Temporary Commission's reforms, even if speedily approved, cannot come into full force for several years. We have not lost sight of the necessity for devising and promoting measures which will afford more immediate amelioration. Thus, through the Committees on Courts of Superior Jurisdiction and Law Reform we have supported the adoption of the rule of comparative negligence; we have been interested in the various pretrial procedures that other jurisdictions have used with success; and we have noted with approval the various salutary measures which Presiding Justice David W. Peck with the loyal support of the Trial Justices has introduced in the First Department.

One of the Presiding Justice's innovations merits special comment: the so-called medical expert testimony project. This project, which was made possible by grants from the Ford Motor Company Fund and the Sloan Foundation, made available to the Judges of the Supreme Court in the First Department a panel of recognized and impartial medical experts for use in cases where the court was not satisfied with the medical facts as developed by the plaintiff's and defendant's "expert" witnesses. The use of impartial experts has demonstrated that their unbiased testimony encourages the settlement of cases and, more important, results in the attainment of more exact justice. These results have justified the Appellate Division in financing the procedure in the future out of its own budget. Early in the fall there will be published the detailed results, both medical and legal, of the experimental period. I commend the report to those interested, not only in personal injury litigation, but to all interested in the fact finding techniques of our adversary system of justice.

As lawyers we have an obligation to see to it that justice is administered efficiently. We are no less interested in the *quality* of that justice. In no field of the law is the quality of justice more important in these times than in the field of civil liberties. Thus, when The Fund for the Republic offered to finance a study by the Association of the Federal Loyalty-Security Program both the Executive Committee and I had no question of our obliga-

tion to undertake what we appreciated would be a difficult task. The Loyalty-Security Program involves directly every citizen of the Republic. In a period of international tension, with the threat of war omnipresent, the security of the nation is paramount, but in our anxiety to uncover and stamp out subversion we must also be alert to maintain the fundamental source of our nation's strength, our rights and liberties as free citizens of a democracy. It is these large issues that an exceptionally competent Special Committee of the Association is considering. We hope that the Special Committee will be able to develop procedures that will be better designed to protect the civil rights of the thousands of public servants and industrial employees who of necessity must be subject to some system of security. The Special Committee is fortunate in having as its Director of Research Professor Elliott E. Cheatham, on leave from Columbia University Law School.

Complementing in a practical way the objective *study* of the Federal Loyalty-Security Program is a project we have undertaken in cooperation with the New York County Lawyers' Association. Again with the financial assistance of The Fund for the Republic the two Associations have agreed to expand the activity of their Legal Referral Service to include giving assistance in finding competent legal counsel for defendants in industrial security cases.

Meanwhile, our standing Committee on the Bill of Rights has been active on a number of fronts. Members of the Association will recall that at the Stated Meeting on March 8, 1955, a resolution presented by the Committee was adopted which condemned "the attempts of any individual or group, private or public, to interfere in any manner with the publication, circulation, or reading of any published matter, other than by means of regular applicable statutory procedures and standards. . ." This action was taken because of the growing concern over the modern revival of the medieval practice of "book-burning." President Eisenhower, the American Library Association, the Book Publishers Council and others have pointed out this new attack on

rights guaranteed by the First Amendment. Our Committee's report was widely circulated and received important support from editorial writers across the country.

The Committee on the Bill of Rights also made a useful contribution to the Board of Education's consideration of the troublesome question of how far the Board should go in requiring teachers to reveal their knowledge of members of the Communist Party in the school system. We were also pleased that Attorney General Javits called on the Committee for its views with respect to legislation dealing with procedures to be followed in cases involving employees under the Security Risk Law and the Feinberg Law.

This request of the Attorney General leads me to mention a development which, if encouraged and continued, will open up, I believe, a rewarding area of public service for the Association. I refer to the disinterested assistance the Association can give public officials. The difficulty which public officials find, because of budgeting and other considerations, in recruiting experienced assistants is a common and serious problem of government. We have among our membership probably more varied professional talent in fields most useful to public officials than any other group. We are anxious to make this talent available as a public service. We have no other ax to grind.

The unusual contribution made this year by our Committee on State Legislation is an example of what we can do. Governor Harriman and his able counsel, Judge Gutman, asked for and received from our Committee during the 30-day bill period the Committee's analysis of some 230 bills. This was in addition to the regular published reports by the Committee. Both the Governor and Judge Gutman have expressed their appreciation of the technical excellence of these reports and their objective treatment of the legislation involved.

Other examples of such cooperation are the series of conferences held with the State Rent Administrator and his staff by the Committee on Real Property Law; the assistance given to the city administration by the Committee on Municipal Affairs in connection with the Mayor's drive to stamp out the giving and taking

of gratuities and bribes; the prompt publication by the Committee on Taxation of its recommendations for changes, mostly of a technical nature, in the new Internal Revenue Code, a service that the Congressional Committees, the Treasury and its technical staffs have appreciated; and the close working relationship the Special Committee on Atomic Energy has maintained with the Atomic Energy Commission and Congress.

The Association's relations with Mayor Wagner deserve special comment. We are a city-wide organization and it would seem that our relations with the Chief Magistrate of the City should be especially close. Unfortunately this was not the case with Mayor Wagner's immediate predecessors. I am glad to say that our relations with City Hall to-day are very gratifying. The Corporation Counsel and his Commissioner of Investigation submit in advance of appointment the names of those lawyers under consideration for exempt legal positions; the Mayor has, in spite of an almost impossible budgetary situation, found additional money for the auxiliary services of the courts which this Association and others have long urged; and he has patiently supported and understood our effort to get the Municipal and City Courts out of the sorry quarters which they now inhabit.

Of course, from the Association's point of view, the most important aspect of this spirit of mutual cooperation with public officials arises in connection with the appointment of judges. We have been consulted consistently in advance by the Governor on his appointments to the bench. I have his assurance he will continue this practice. We have also had similar cooperation from our distinguished member, Attorney General Brownell. The appointments of J. Edward Lumbard and Sterry R. Waterman to the Court of Appeals and William B. Herlands to the District Court had our enthusiastic approval, as did the appointment of Mary Donlon to the Customs Court. The Mayor has honored his pledge to consult us about his judicial appointments and has appointed no individual after our disapproval of the proposed nominee as unqualified.

We regret that both the Governor and the Mayor, on occasion, have allowed us such a short period of time, sometimes as short as

twenty-four hours, in which they have requested our views as to a candidate. This has made it often very difficult to express an informed opinion, particularly as many of the candidates are sufficiently inconspicuous to be unknown to the members of our committees.

The selection of candidates for judicial office, where the office is elected, presents a special problem. Although theoretically the judges are chosen by the people because they are elected, we all know that as a practical matter the candidates cannot be said to be the choice of the people in any real sense. There can be no real choice without knowledge. The qualifications of most of the candidates for whom the people are asked to vote on the November ballot are completely unknown to the voter when he enters the voting booth. A poll taken by our Association, in conjunction with others, last fall after the November election, indicates that the overwhelming majority of voters could not even remember the names of the judges for whom they had voted after leaving the polling booth. These judges are, as we all know, in reality selected by the political leaders.

It is for this reason that we have for many years urged the political leaders to submit names to our Association before making nominations at the judicial conventions so that they may have the informed views of the Bar as to a proposed candidate before he is put in nomination. I am exceedingly gratified to be able to announce that this September, for the first time in many years, prior to the judicial conventions to nominate Supreme Court justices, the leaders of the two great political parties in Manhattan did comply with the urging of our Judiciary Committee and submitted names before the judicial convention. Unfortunately they did so only two days before the convention but our Judiciary Committee, nevertheless, convened on short notice and was able to pass upon and approve as qualified three of the names submitted. In the short period allowed, the Committee was unable to obtain information with regard to the other names submitted. Here again the shortness of notice is to be deplored and we hope that some procedure may be worked out in future years whereby

we may be afforded adequate time in which to review the qualifications of the nominees submitted. Of course, the report of the Judiciary Committee on all candidates will be submitted to the Stated Meeting of the Association on October 18, 1955 before Election Day.

While I am considering the state of the judiciary, I cannot forego the opportunity of stating once again this Association's gratification and pride in the appointment to the Supreme Court of the United States of our fellow-member, John Marshall Harlan, who is already demonstrating those exceptional qualities which we long admired. We are also pleased that Chief Judge Conway, and Judges Desmond and Van Voorhis have been returned to the Court of Appeals. We regret, however, that the Federal District Court for the Southern District will no longer have the wise and gentle guidance of Chief Judge Knox. Judge Knox has earned the rewards of a less strenuous life, but the Bar will hope that he continues to hold court from time to time for many years to come.

During the past year we have lost two members of preeminent distinction: Augustus Noble Hand and John W. Davis. At a memorial service held at the House of the Association, Chief Judge Clark and Judge Wyzanski expressed eloquently what we all must feel about the end of Judge Hand's great career. Mr. Davis was the unquestioned leader of the American Bar. We shall miss them both.

Mr. Davis, who always maintained his interest in Association affairs, was particularly interested in the Association's opposition to the Bricker proposal to shackle the President's conduct of foreign affairs, and lent his prestige as our leading constitutional lawyer to that opposition. This year the Committees on Federal Legislation and International Law published another excellent brief against the amendment, "A Continued Defense of the Constitution Against the Bricker Proposals." This document was sent to every member of Congress and made available to the numerous groups with whom the Association has joined in opposing the amendment. This year, too, the Association was again ably repre-

sented at the Senate hearings on the amendment. Indeed, our representative was called to testify on the first day of the hearings immediately following Senator Bricker's testimony.

In addition to the report on the Bricker amendment, the Committee on Federal Legislation has prepared an important report opposing the Reed-Walter resolutions (H.J. Res. 200 and 201) which would provide for a new and radical method of initiating amendments to the Constitution: proposal by the legislature of any state and concurrence by the legislature of any twelve states, thus by-passing the Congress. I am hopeful that the Committee in the coming year will also renew with vigor its support of the Public Defender Bill, which the Judicial Conference of the United States and the National Legal Aid Association are supporting.

In the last session of the State Legislature we were at last successful in getting passed for the second time the proposed amendment to the Constitution which will require judges to resign their judicial office when they become candidates for non-judicial office. The proposal now goes to the voters at the next general election. We also were successful with a bill sponsored by the Committee on Legal Aid which amends Section 308 of the Code of Criminal Procedure to provide for payment of counsel fees on appeal as of right from a judgment of life imprisonment following a recommendation of a jury pursuant to Section 1045-a of the Penal Law.

Once again we failed to induce the legislature to meet its responsibility in regard to the inadequate laws concerning the family in this State and the scandalous and sordid conditions that have arisen in their administration in the courts. Largely through the devoted and energetic work of the Special Committee on Improvement of Family Law a public hearing was held on the Gordon-Peterson bill, which would establish a Commission to study and recommend reforms in this field. There was little overt opposition at the hearing, but when the measure came up in the Assembly it was defeated by some 20 votes. This unhappy result, I am sorry to say, appears to have been achieved by the old device of logrolling, a maneuver that does no credit to those who engi-

neered it or to those members of the legislature who found it expedient to sacrifice principle to political expediency.

We hear a good many legislators, public officials, judges and religious leaders deploring the rise of juvenile delinquency. Obviously the break up of the family unit, which is encouraged by our present law and the handling of matrimonial cases in our courts, is an important contributing factor to the increase of juvenile delinquency. The passage of the Gordon Bill would be at least the first step in finding a solution for a situation which will not be remedied by pious public pronouncements.

An important part of the Association's work is what has now become generally known as "continuing legal education." During the past year a number of the Committees have sponsored educational programs that have been open to the entire Bar and in some cases to the public as well. Examples of these are the symposium sponsored by the Committee on Arbitration; the forum, "What's Happening in the Insurance Business," sponsored by the Committee on Insurance Law, and which had as its presiding officer our fellow member, Mr. Leffert Holz, who recently has been appointed Superintendent of Insurance for the State; and the interesting forum which the Committee on Foreign Law sponsored on the subject as to whether German assets seized during World War II should be returned to the former owners. The program of the Committee on Post-Admission Legal Education was, in the well established tradition of that Committee, of a very high quality. About 40 meetings were held by the various Sections of the Committee. Most of these Section meetings were devoted to bread-and-butter discussions of substantial practical benefit to the Bar. The Section on Administrative Law and Procedure brought to the Association Commissioner J. Sinclair Armstrong of the Securities and Exchange Commission; its General Counsel, William H. Timbers; Judge E. Barrett Prettyman, the Chairman of the President's Conference on Administrative Procedure; and Commissioner Hugh W. Cross of the Interstate Commerce Commission. The new Section on Corporate Law Departments had a number of stimulating sessions which dealt with important problems of the corporation attorney. This Section has

brought into the Association a substantial number of lawyers in legal departments of corporations who have not heretofore been active in the Association. The Section on Jurisprudence and Comparative Law had as its guest on one occasion Mr. Edward J. Grenier, and presented at a Stated Meeting of the Association Judge Shneour Zalman Cheshin, the Deputy President of the Supreme Court of Israel. The Section on Trade Regulation held four meetings devoted to recent developments in the anti-trust law. At one of these meetings The Honorable Stanley N. Barnes, Assistant Attorney General, and Professor S. Chesterfield Oppenheim, discussed the work of the Attorney General's National Committee to Study the Antitrust Laws. The other Sections had equally interesting programs. Three lectures were presented by the Committee on Post-Admission Local Education, the first by Mr. Justice Edward S. Dore, "Expressing The Idea—The Essentials of Oral and Written Argument." At the second lecture Dean Erwin N. Griswold of the Harvard Law School spoke on the subject "Lawyers, Accountants, and Taxes." The final lecture, "The Role of the Lawyer in Collective Bargaining," was given by Secretary of Labor James P. Mitchell. The Committee designated Mr. Tweed as the Cardozo lecturer and had originally scheduled Mr. Tweed's lecture for April. Due to Mr. Tweed's illness the lecture has been postponed to the early fall.

Not the least of Mr. Tweed's achievements as President was the encouragement he gave to the arrangement of all sorts of occasions whereby we could join together and, in the words of our Charter, cherish "the spirit of brotherhood. . ." Certainly a most pleasant and rewarding example of such an occasion was the last Annual Meeting when the Medal of the Association was presented to Mr. Tweed and when we enjoyed being with him and hearing his charming and typical words of acceptance. Another such occasion was the light-hearted Twelfth Night Party which the Entertainment Committee planned as a tribute to Mr. Davis. We have reason to believe the guest of honor enjoyed himself as much as we all did.

The Entertainment Committee also produced a topnotch show for Association Night, "Quick Henry, The Writ" and spon-

sored a dance, which those of us who *did* attend enjoyed because for once in New York there was room enough on the floor to dance with abandon.

Then there were the Photographic and Art Shows, which have seemed to each President to become more interesting and varied during *his* administration. I enjoyed myself at a reception given by the Committee on Foreign Law and International Law to the lawyers associated with the Secretariat and Delegations of the United Nations, and at a similar affair in honor of the Mayor, the Police Commissioner, the Court of Special Sessions and the City Magistrates, sponsored by the Committee on Criminal Courts. In the late summer the Lord Chancellor of Great Britain, Viscount Kilmuir, was our guest and later on the Secretary of The Law Society, Mr. Thomas Lund. But the spirit of good fellowship is also in evidence at the dinner meetings of our Committees, and, as I have said, I am grateful to the Committees not only for the good work they have done, but also for the pleasure I have had in the meeting with them and sharing their friendly hospitality.

Indeed, I should like to pay tribute to every Committee by commenting in this report on a great many achievements and services to the Association and to the public that I have mentioned. However, the record is presented in a better and more interesting way in the annual reports which are printed in the Year Book.

It occurs to me in reviewing the year past that some words of Mr. Justice Holmes, although spoken in a quite different frame of reference, are relevant to what we all are contributing through our work in the Association:

"The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society. When I hear that one of the builders has ceased his toil, I do not ask what statute he has placed upon some conspicuous pedestal, but I think of the mighty whole, and say to myself, he has done his part to help the mysterious growth of the world along its inevitable lines towards its unknown end."

International Law and the United Nations

By The Honorable Dag Hammarskjold

Secretary-General of the United Nations

It gives me great pleasure to speak tonight to an Association which has long taken a deep interest in world problems. Its distinguished leaders—such as Elihu Root, Henry Stimson and Charles Evans Hughes—have been known throughout the world for their contributions toward the efforts to make the rule of law the basis of international relations. It is indeed a notable feature of the American tradition in foreign affairs to attach high importance to the establishment and maintenance of standards of international law and justice.

I should like to speak to you about the part the United Nations takes in the making of international law, and the relation between the efforts of the United Nations in this regard and the national legal systems of States.

In selecting this theme I have done so not merely because of its obvious interest to lawyers, but because of its timely character. In the community of nations our means for dealing peacefully with the inevitable conflicts of interest which arise between them are diplomacy, international organization and international law. International law has been the least prominent of these means in recent years; its growth has been disappointingly slow, and it has been viewed too often as a conservative stabilizing element rather than as a dynamic instrument for peaceful development. Now that we may have come to a new turn, when we can reasonably hope that a real relaxation of international tensions will come to pass, it becomes essential to consider international law, not as a body of doctrine, but as a means of achieving rational and orderly co-operation in the solution of vital international problems.

Editor's Note: Mr. Hammarskjold delivered this lecture on September 15 under the auspices of the Committee on Post-Admission Legal Education, Orison S. Marden, Chairman.

At the same time we must bear in mind the importance of respecting the proper boundaries between international and national jurisdiction and of avoiding needless tasks and prohibitions imposed in the interests of uniformity. Thus the theme of my talk tonight is both political and legal. Its logical starting point is Article 38 of the Statute of the International Court of Justice, which provides that the Court, in deciding such disputes as are submitted to it, shall apply international conventions establishing rules recognized by the parties; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and, as subsidiary means for determining the rules of law, judicial decisions and the teachings of the most highly qualified legal authorities of the various nations. Thus there are roughly speaking five sources of the law: treaties, international customs, general principles of law, judicial decisions and the writings of eminent scholars.

The United Nations plays an important part in developing the law by several of these methods. Treaties are drafted under its auspices; its decisions may show the existence of international custom; and the decisions and the advisory opinions of its principal judicial organ, the International Court of Justice, have the prestige of the highest authority on questions of international law.

The conclusion of a convention is the most obvious way of bringing a new rule of law into effect. The States which desire to work out a solution of a particular international problem meet together, consider the problem in the light of their individual and joint interests, draft a convention embodying a rule for their future conduct, and, if they are then willing to accept the convention, they become parties to it. When solutions are sought on a multinational basis, such problems are most suitably dealt with in the United Nations, which can discuss any problem in the international field, and in the specialized agencies, like the International Civil Aviation Organization, UNESCO and the World Health Organization, which are part of the United Nations family and which have special competence in their own fields.

There are two general types of multilateral treaties which are

prepared under the auspices of the United Nations and its specialized agencies. Treaties of the first type involve mutual concessions for the sake of mutual advantage, like ordinary contracts in national law. These include such treaties as the General Agreement on Tariffs and Trade, in which the parties agree to make tariff reductions for the sake of expanding the economic opportunities of all. Another example is the Universal Copyright Convention drafted under the auspices of UNESCO, which the United States has ratified and which is about to enter into force.

The other type of multilateral treaty in some ways more closely resembles a law than a contract. Such conventions are concluded for some general humanitarian purpose, to remedy some social evil which requires international action, and in the interest of the international community as a whole. This type of convention has long been used in dealing with such problems as slavery, narcotics, the traffic in women and children and obscene publications. Many of the old conventions in these fields have been revised and brought up to date under the auspices of the United Nations. Moreover new conventions have been drafted in the Organization in a number of new, or relatively new, fields such as genocide, refugees and displaced persons, the status of women and freedom of information.

The creation of new international law by conventions is sometimes a slow and uncertain process. The drafting of a new convention by itself accomplishes little; States must become parties to the convention before the new rule has any effect, and this often takes considerable time. It occasionally happens that although there initially appeared to be considerable enthusiasm for an advance of the law, support for it diminishes when the acid test of ratification is reached, and the treaty is slow to enter into force. Thus the making of conventions requires a wise discrimination, a sense of timing, and a deep appreciation of national needs and preferences in determining whether and to what extent a treaty is appropriate. Such treaties can be justified only to the extent that they meet a real international need, as determined by the enlightened consideration of the interest of States.

Other methods of developing international law than the con-

clusion of new conventions are available. For example, one more rapid method is that in use in the International Civil Aviation Organization. Under the Organization's constitution its Council adopts standards and "recommended practices" which come into force after a specified period unless the majority of the members register their disapproval within that period.

In the field of the unification of private law a method has been used which largely dispenses with conventions and even international obligations, and operates through parallel legislation in several countries. This method has been pioneered by the Scandinavian States, which have long co-operated closely in the legal, social, economic and cultural fields. Since 1872 a movement has been under way for the achievement of uniformity in various fields of national law, and in 1946 a permanent joint agency for juridical co-operation was established by the Scandinavian Ministers of Justice. Meetings of jurists from the various countries have proposed legislation which has then been transmitted to the governments for consideration in accordance with their constitutional procedures. Many drafts thus prepared have been adopted, with the result that the four Scandinavian countries now have more or less uniform legislation on such subjects as negotiable instruments, sale of personal property, insurance, marriage, and maritime and seamen's laws. In only a few cases has this uniform legislation taken the form of conventions.

This success has, of course, been made easier by a community of interests and tradition in the Scandinavian countries, which does not exist for the community of nations as a whole. Nevertheless this an example of what can be accomplished in this way that may have relevance in other parts of the world even today.

I should now like to turn to the internal law of international organizations, in particular the United Nations, and its relation to international law. No organization today embraces the whole community of nations. Furthermore, all international organizations have under their charters or constitutions only very limited powers of imposing legal obligations on Member States without their consent. Thus there can be no question of legislating inter-

national law in such organizations. Nevertheless, international organizations can make important contributions to customary law.

International organizations are continually called upon to interpret their own constitutions, and these constitutions in turn contain concepts of international law. The United Nations Charter, for example, prohibits aggression and interference with matters of domestic jurisdiction; decisions interpreting such provisions, which are taken on the basis of legal considerations, assist in illuminating not only the meaning of the Charter, but of international law itself. In general, the stresses of the past ten years have made it necessary for the organs of the United Nations to maintain a maximum of flexibility, and only the beginnings have been made of a clear and consistent "common law" on the interpretation of the Charter. But in a calmer period when the practice of the Organization can become stabilized, the customary law of the United Nations will be a rich source of evidence on customary law in general.

Further, the constitutions of international organizations are treaties, albeit of a special kind, and they must be interpreted and applied in the light of international law. Thus the interpretations by international organizations about the extent of their constitutional powers may come, in time, to evidence a special new branch of the customary law on the interpretation of treaties.

Moreover, the United Nations has occasion to deal with issues of ordinary international law in considering questions brought before it. In the course of its world-wide operations, problems of international law also arise. For example, the United Nations has capacity to bring international claims for reparation of injuries suffered in its service, and doing so involves questions of state responsibility. Representatives of Members sometimes have problems concerning diplomatic immunities. Such cases as these can constitute evidence of international custom.

Another type of contribution to the clarification of customary law is made in the United Nations. Under Article 13 of the Charter, the General Assembly is given the function of initiating

studies and making recommendations in order to encourage the progressive development of international law and its codification. To assist it in this work the General Assembly has established the International Law Commission, which conducts studies and makes recommendations to the Assembly for those purposes. The work of the Commission may in future lead to the conclusion of multilateral conventions on some topics of law; in the meantime, the drafts prepared by the Commission have the authority of the conclusions of an international group of experts, reached in the light of careful study. The Commission, whose work is of the highest interest to lawyers everywhere, has dealt with such subjects as the continental shelf, territorial waters and statelessness and it is about to embark on a re-examination of the principles governing the responsibility of States for injuries suffered by foreigners in their territories.

Many of the decisions of the United Nations have, however, no direct relation to international law, though they may constitute part of the internal law of the Organization. Numerous resolutions of the General Assembly, for example, deal with such matters as the functions and methods of operation of subsidiary bodies, regulations for the handling of the finances and personnel of the Organization, and the like. These resolutions all have legal force within the Organization, and we who work for it are daily engaged in interpreting and applying them. Some of them are highly interesting and significant, as they establish the framework of international co-operation in particular fields. For example, a resolution of the General Assembly recently convoked the conference on the peaceful uses of atomic energy, and others have created machinery for technical assistance to States which need it, have established institutions such as the United Nations Children's Fund, the United Nations Agency for Palestine Refugees, the United Nations Agency for the Reconstruction and Rehabilitation of Korea, and so forth.

Another class of United Nations decisions consists of recommendations to States. These recommendations are of different degrees of definiteness and urgency. In some cases a standard is

set up only as a goal for aspiration, and obviously does not require immediate and total conformity. Even when recommendations are in stronger terms, however, they impose upon the Member States to which they are addressed only the obligation, at most, to consider seriously the question whether or not to comply. But this minimal obligation may carry weight in the long run in influencing national action. The considered views of a body composed of representatives of many States have a moral force which it is impossible to overlook.

I come now to the contribution of the United Nations to judicial decisions as a source of evidence of the law. The principal judicial organ of the United Nations is the International Court of Justice. Its Statute, as I have said, provides that judicial decisions, even those of the Court itself, are only a subsidiary means for the determination of rules of law. The Statute, which more nearly follows Continental than Anglo-Saxon ideas about the force of judicial precedents, also declares that "The decision of the Court has no binding force except between the parties and in respect of that particular case." Nevertheless, the Court is the highest authority in the world on international law, and consequently its judgments and advisory opinions are necessarily an important source of evidence of that law. In practice the Court, though under no obligation to do so, always considers its own precedents and follows them where they apply. Other international organs likewise pay careful attention to the judicial pronouncements of the Court, which form a coherent international jurisprudence and are an important means of clarifying and developing international law.

The International Court of Justice has dealt in its judgments with such issues as the right of exclusive fisheries in coastal waters; the right of asylum; the protection of nationals abroad; and the effect of the most-favoured nation clause in treaties. It has rendered advisory opinions to the General Assembly about such matters as admission of new members to the United Nations, the interpretation of the peace treaties with Bulgaria, Hungary and Romania, and the status of South West Africa.

Thus the United Nations and other international organizations are making contributions in various ways to the development of international law. Given a favourable international atmosphere, these contributions can be greatly increased. Some critics feel, however, that the law is growing much too slowly and that the United Nations, based as it is upon the principle of the sovereignty of States, is only a rudimentary instrument for creating law. Their prescription for the salvation of mankind is to sweep away present techniques and the international organizations through which they operate, and to set up a much stronger world legal order, with power to make and to enforce binding laws.

Other critics feel that it is idle or undesirable to spend so much effort on the development of international law, and that the United Nations is doing too much in this direction. Some of this latter group are sceptics who view all international differences as wholly political, and dismiss a concern for the law in such matters as self-deceiving idealism. Still others are strongly conscious of the value of their national traditions and techniques, and are afraid that the development of law on the international level will somehow interfere with these national traditions.

To the first school of thought which would like to go much farther and faster than is being done at present, it can be conceded that the growth of the law has been slow, especially during the last ten years. The cause of this slowness, however, lies deeper than inadequacy of methods; the methods themselves are highly flexible, and a much better rate of construction can be achieved whenever the great mass of mankind desires it.

As for the second school, we may freely admit that the law is not a panacea whose manufacture and use will automatically bring about the triumph of reason and virtue. Nevertheless, the law does play a significant part in the formation of policy by governments, which habitually prefer to abide by it. This means that the development of the law is a useful method for the attainment of ends agreed on among States.

The development of international law is not a threat to the

sovereignty of States, but a safeguard, since order is a condition of any real freedom. The growth of international law is completely within the control of States. If, for example, a new multilateral convention is drafted under the auspices of the United Nations, no State is bound by it unless that State itself takes further steps to become a party. In a few rather exceptional cases, which are usually agreements of a subsidiary character where the main obligations have already been undertaken by more formal means, States may become parties by simple signature. Ordinarily, however, signing a convention imposes only an obligation to consider whether or not to ratify. In either event each nation remains entirely free to accept or not to accept the obligations of the agreement in the light of its own national interest as determined by its own constitutional processes. Becoming a party to an international agreement is in itself an exercise of sovereignty rather than its curtailment.

The development of customary law through the practice of international organizations is a protection to the member countries. No country can foresee when an issue affecting it will come under discussion, and if that occurs it is very much better to have the discussion carried out on the basis of objective principles established by such practice than to contend with a majority inspired perhaps by purely political considerations.

The United Nations serves as a centre for the common consideration of common problems and for steps toward their solution on a world-wide basis. It has been reasonably effective in this function in the past, despite adverse conditions, and there are hopes that it will be much more so in the future. As lawyers we may feel impatient with the slowness of the law-making process in the Organization. But we have no reason for despair. On the other hand, as lawyers, we should make it clear and widely understood that there is no ground for fear or suspicion that international law-making is a threat against the sovereignty and national traditions of States.

International law-making is a highly meaningful process, worthy of the study of groups of distinguished lawyers like yours.

It can benefit at every stage from informed comment and critical examination of the kind that your Association has made in the past. Such study not only helps to clarify the technical points involved; it also promotes public understanding of the whole process, and without public understanding efforts in the field are likely to be very much less fruitful than they should be. There is therefore a real service to be performed by lawyers in Member countries of the United Nations, as has been so well shown by your Association in the past and will, I am sure, continue to be shown in the future.

I mentioned in the beginning men like Elihu Root, Henry Stimson and Charles Evans Hughes. Their example is a living challenge to continued efforts to develop international law—an example as relevant to the members of this Association as to the servants of the United Nations.

Annual Review of Antitrust Developments

By MILTON HANDLER

At the outset of this annual review of antitrust developments, I should refer to the most significant recent development—a merger of my own making. Understandably, this caused a postponement of this year's talk from February, its usual time, to June, the month normally associated with weddings. As yet no impertinent requests for information concerning my acquisition have been received from either the Federal Trade Commission or the Department of Justice. Nor has it been measured by the quantitative substantiality, the qualitative substantiality, the concentric circle, the monopoly abuse or the incipiency tests.

Last year I analogized my role in antitrust to that of the old family doctor. If I may again resume that role, I may report to my many friends in the audience that the participants in the merger are doing very well.

In other respects, the year has been rather disappointing. The Supreme Court has been relatively unproductive.[1] By a process of reasoning which one of the dissenting justices describes as baffling to "the subtlest ingenuity," the Court differentiates between boxing and baseball in determining the impact of antitrust.[2] The exemption of the national pastime rests upon the Court's unwillingness to overrule its earlier decision in the Federal Baseball case;[3] it refuses to convert a narrow application of the rule of stare

Editor's Note: Mr. Handler's review of recent antitrust developments is an annual feature of the Section on Trade Regulation of the Committee on Post-Admission Legal Education. Orison S. Marden is Chairman of the Committee and John E. F. Wood is Chairman of the Section.

[1] *U. S.* v. *Employing Plasterers Asso.*, 347 U. S. 186 (1954); *U. S.* v. *Employing Lathers Asso.*, 347 U. S. 198 (1954); *U. S.* v. *Borden Co.*, 347 U. S. 514 (1954); *United Shoe Machinery Corp.* v. *U. S.*, 347 U. S. 521 (1954); *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954); *U. S.* v. *Shubert*, 348 U. S. 222 (1955); *U. S.* v. *International Boxing Club of New York, Inc.*, 348 U. S. 236 (1955); *FTC* v. *Rhodes Pharmacal Co.*, 348 U. S. 940 (1955); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955).

[2] *U. S.* v. *International Boxing Club of New York, Inc.*, 348 U. S. 236 (1955).

[3] *Federal Baseball Club* v. *National League*, 259 U. S. 200 (1922).

decisis into a sweeping grant of immunity in favor of all sports or such local enterprises as the legitimate theatre.[4] And so, with the boxing and theatre cases, the progressive expansion of the federal regulatory power under the commerce clause continues. This tendency is further exemplified in *Moore* v. *Mead*,[5] where the Robinson-Patman Act was applied to a discrimination occurring wholly in intrastate commerce, all the seller's interstate transactions being non-discriminatory.[6] The important ruling of Judge Wyzanski in *United Shoe Machinery*[7] was affirmed without opinion[8] but the Court did not reach this term the appeal from Judge Leahy's decision in the *Cellophane* case.[9] By the unusual procedure of a per curiam affirmance in an important antitrust case, the Court seemingly approves the lower courts's penetrating analysis and upholds its thesis that a monopoly, though legal in its inception, may become illicit if perpetuated by lawful devices designed to prevent the rise of new competition. Judge Wyzanski predicated his decision on the distinction between industrial growth which leaves the door of opportunity open for others, and growth resulting from tightly closing the door to new competition.[10] Perhaps when it decides *Cellophane* the Court will elaborate its own views on the factors which transform a lawful monopoly into an illegal monopolization and dissipate the fear that economic power achieved by normal expansion without any foreclosure of competitive opportunity may entail a violation of Section 2. In coping with this problem, the Court should find extremely useful the acute treatment of monopoly in the Report

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[4] *U. S.* v. *Shubert*, 348 U. S. 222 (1955).

[5] 348 U. S. 115 (1954).

[6] See also the expanding scope accorded the commerce power in the labor cases. *U. S.* v. *Employing Plasterers Asso.*, 347 U. S. 186 (1954) and *U. S.* v. *Employing Lathers Asso.*, 347 U. S. 198 (1954). *Cf. Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955).

[7] *U. S.* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

[8] 347 U. S. 521 (1954).

[9] *U. S.* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), probable jurisdiction noted, 348 U. S. 806 (1954).

[10] Handler, *Monopolies, Mergers and Markets—A New Focus*, 1 Trade Regulation Symposium, Nov. 9, 1954, p. 25.

of the Attorney General's National Committee to Study the Antitrust Laws.[11]

II

Mergers have continued this past year to engage the attention of the Federal Trade Commission, the Department of Justice, Congressional Committees and the bar. The Commission has just concluded a study of corporate acquisitions for the Congress. It finds that we are in the midst of a major merger cycle. Since 1949, the pace has been rising; in 1954 the number of reported mergers was three times that of 1949. There have been 1,773 mergers from 1948 to 1954. The Chairman of the Commission regards the trend as "very disturbing."[12]

The Department in recent months has instituted three important cases challenging the legality under the Clayton Act of mergers in the hotel, shoe and whiskey industries. In addition, it has publicly disclosed its disapproval of the fusion of Bethlehem Steel and Youngstown Sheet and Tube,[13] and its acquiescence in the mergers of the smaller automobile companies. These concrete acts provide some clue to the Department's real views on the meaning and scope of amended Section 7.

The *Hilton* litigation[14] challenges the union of the Hilton and Statler chains. The complaint is most curious for a merger case. It is extremely sparse of pertinent factual allegations. It tells very little about the relative position of the two companies before or after the combination. It merely asserts that before the acquisition Hilton was the largest and Statler the second largest hotel chain in the country; that Hilton operated 15 hotels in 11 cities with 16,500 rooms; that Statler ran nine hotels in nine cities with 9,830 rooms; that Hilton had assets of $105 million and gross revenues of $97 million, while Statler's figures were $67 million and $60 million; that both companies did a large part of the convention business of the cities in which their hotels are situated;

[11] Ch. I, pp. 43–62.
[12] Testimony before Senate Subcommittee on Monopoly, N. Y. Times, June 2, 1955, p. 47.
[13] Department of Justice Release, Sept. 30, 1954.
[14] *U. S.* v. *Hilton Hotels Corp., Civ.* 1889–55 (D.D.C. April 27, 1955).

that both spend large amounts for advertising, food and beverages, furniture and supplies. Hilton has four hotels and Statler one in New York; each has a hotel in Washington, D. C., St. Louis and Los Angeles. These are the only cities where the two companies directly compete. The complaint also stresses the competition nationally in obtaining convention business but reveals no facts concerning the nature of this business or defendants' relative position therein. The ways in which Section 7 is violated are specified as (a) elimination of actual and potential competition in the hotel business, including the soliciting and servicing of conventions throughout the United States generally and particularly in the four cities in which the chains directly compete; (b) enhancement of Hilton's competitive advantage over other hotels; (c) permanent elimination of Statler as a substantial competitive factor; and (d) substantial increase of concentration in the hotel industry, nationally and in certain sections. The prayer is for divestiture of the acquired properties in the four cities and such other properties as the court deems necessary to restore competitive conditions in the industry.

If I read the complaint correctly, it is an attack, pure and simple, on bigness. There is no indication of the economic power of either company or of the combined companies in their fields. There is no indication of the structure and size of the industry, the strength, relative standing and economic power of competitors, or the economic effects of the acquisition. The case seems to rest baldly on the proposition that the disappearance of a large competitor through merger is a *per se* infraction of Section 7 without regard to the strength, health or vigor of the remaining competition. This would appear to be the quantitative substantiality test of *Standard Stations*,[15] which the Attorney General's Committee, including its Government members, overwhelmingly rejected. It is the antithesis of *Pillsbury*,[16] which the Committee approved.

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[15] *Standard Oil Co. of California* v. *U. S.*, 337 U. S. 293 (1949).
[16] *Pillsbury Mills, Inc.*, CCH Trade Reg. Rep. Par. 11, 582 (FTC 1954).

The merger chapter of the Committee's report is not one of its happiest achievements. It says very little that was not better said before. It reviews quite inadequately the legislative history, the law prior to the Celler Act, the *Transamerica*,[17] *Benrus*,[18] and *Pillsbury* cases, and applauds the Third Circuit and the Commission for their repudiation of the quantitative substantiality rule of *Standard Stations*. It points out that the statutory yardstick is not the same as that of the Sherman Act, that all mergers are not interdicted, that there must be more than the disappearance of a substantial quantity of competition and that an economic analysis of the effects, potential as well as actual, of the proposed acquisition must be made to determine its legality. It resorts to metaphors, as did the framers, and suggests that the test is whether the acquisition will have the potential effect of impairing the vigor and health of the remaining competition in the industry. In determining this question, it outlines various factors which it deems relevant, but concludes with this Delphic reservation: "We do not, of course, imply that all, several, or any one of these guides may be significant or even relevant in a given case."[19]

Hilton would indicate that the draftsmen of its complaint did not regard any of these guides as significant or even relevant and that they line up with the small minority on the Committee who urged that the standard should be "whether the amount of competition *lost* is substantial."[20] If *Hilton* represents the considered view of the Department, it would seem that the Attorney General has turned down the recommendations of his advisory committee as well as the construction adopted by the Commission in *Pillsbury*. It is entirely possible that the proofs may put a different complexion on the complaint. But taking imprecise judicial notice of the number of hotels in Washington, St. Louis, New York and Los Angeles not controlled by Hilton or Statler, it would

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[17] *Transamerica Corp.* v. *Federal Reserve System*, 206 F. 2d 163 (3d Cir. 1953), cert. denied, 346 U. S. 901 (1953).

[18] *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738 (2d Cir. 1953) aff'g., 114 F. Supp. 307 (D. Conn. 1953).

[19] Ch. III, p. 125.

[20] Ch. III, p. 127.

hardly appear that this fusion is apt to have the anti-competitive effects which the Committee believes the law requires.

The *General Shoe*[21] complaint is equally bereft of allegations showing any impairment of the vitality and effectiveness of the outside competition in the shoe industry. It relies upon the following facts:

General operates 30 manufacturing plants and 500 retail shoe stores. In 1954 it sold 25 million pairs of shoes having a dollar value of $135 million. Close to 18 milion pairs of shoes were sold at wholesale and a little more than seven million at retail. Its shoes are sold under various brands, many of which are exceedingly well-known. Since 1950 it has acquired 18 companies, of which some manufactured shoes, some sold shoes at retail and some did both. These acquisitions are listed with no indication of the size, position or volume of business of the acquired companies, or any other relevant information, with the exception of Delman, whose sales in 1954 were approximately $2½ million, and which is alleged to have a manufacturing plant in New York and retail outlets in New York, Philadelphia and Palm Beach. It is asserted that the total annual sales of the acquired companies exceeded $67 million, of which $34 million was sold through their 250 retail outlets. The complaint charges that these acquisitions cumulatively will lessen competition and tend to monopoly in the production and distribution of shoes and that competing manufacturers will be foreclosed from a market consisting of 250 outlets with annual sales of $34 million. It concludes with the claim that industry-wide concentration in a few companies has been increased.

It may well be that the cumulative effects of these many transactions has so altered the competitive texture of both the manufacture and retail sale of shoes as to constitute a clear infraction of Section 7. What is so curious about this and the *Hilton* complaints is the total absence of any allegation to that effect. From the face of the pleadings, it would seem that the Government is seeking a *per se* reading of the new law.

[21] *U. S.* v. *General Shoe Corp., Civ.* 2001 (M.D. Tenn. March 29, 1955).

That it knows how to draft a complaint setting forth the anti-competitive effects of a transaction in a relevant market is demonstrated by *Schenley,*[22] which fairly bristles with percentage figures so conspicuously absent from *Hilton* and *General Shoe.* This suit attacks Schenley's acquisition of the controlling stock of Park & Tilford. After a short and interesting description of the liquor industry, the complaint states that Schenley is one of the Big Four (the others not being disclosed); that since 1933 concentration of all phases of the liquor business in the hands of these four companies has been constantly increasing; that a substantial proportion of the growth of each of the Big Four has been through acquisitions or mergers; and that between 1933 and 1950 Schenley purchased more than 50 companies. Then come the pertinent statistics:

(a) In 1953, Schenley had the largest maximum annual capacity for producing whiskey. It controlled 17% of the total industry capacity; Park and Tilford 3%.

(b) In 1953, Schenley was the second largest producer of whiskey. Its percentage of actual production was 22%; Park & Tilford 4%.

(c) In 1953, Schenley was the second largest bottler of whiskey. Its percentage was 14%; Park & Tilford 3%; the combined 17% exceeded that of any other bottler.

(d) In 1954, Schenley had 17% of the industry's storage capacity; with Park & Tilford, the total will be 19%.

(e) Schenley has the largest number of barrels in storage; with Park & Tilford's inventory it controls 22% of the whiskey in storage.

(f) Schenley's sales in 1953 were 17% of the industry's dollar volume; Park & Tilford accounted for 2%.[23]

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[22] *U. S.* v. *Schenley Industries, Inc.,* Civ. 1686 (D. Del. February 14, 1955).

[23] The complaint contains a strange paragraph in which Park & Tilford's percentages are aggregated with those of the Big Four, three members of which are not involved in the suit. This provides some impressive figures—59% of industry capacity; 66% of actual production; 72% of the whisky bottled; 54% of the industry's storage capacity, and 75% of the industry sales. Of course, the figures could be made even more impressive by adding the percentages of other non-defendants.

If the proofs do not go beyond the allegations of the complaint, *Hilton* and *General Shoe* will tender to the courts a theory of liability which most of the experts assembled by the Attorney General regard as unsound. On the other hand, *Schenley,* in assailing the cumulative effects of multiple acquisitions in an industry comprised of a few sellers, invites the type of market analysis which the Attorney General and his Committee have advocated.

We are now moving toward an authoritative judicial construction which will, perhaps, put an end to the interminable guessing game in which all analysts of Section 7 have perforce been engaged. It is to be hoped that the advisory recommendations of the Attorney General's Committee will fare better with the courts than they appear to have with the Department itself.

III

In my brief treatment of exclusive dealing arrangements in last year's lecture, I contrasted the test of quantitative substantiality sanctioned by the Supreme Court in *Standard Stations*[24] with that of qualitative substantiality applied by the Federal Trade Commission in the *Maico* case.[25] Under the former standard, exclusive dealing will be held to have the proscribed effect of substantially lessening competition if it embraces a substantial number of outlets through which passes a substantial volume of commerce, It makes no difference that the practice may have no prejudicial effect upon the seller's competitors who prosper and are not denied reasonable access to the market. On the other hand, under the qualitative substantiality test, the exclusive dealing not only must pertain to a substantial volume of business but also must have potential or actual anti-competitive consequences. I pointed out last year:

> "In the case of goods sold for resale, the question should not merely be the size of the seller or the volume of busi-

[24] *Standard Oil Co. of California* v. *U. S.,* 337 U. S. 293 (1949).
[25] *Maico Co.,* F. T. C. Dkt. 5822 (1953).

> ness covered by exclusive contracts, but whether competing sellers are deprived of effective access to the market. If there are available to actual or potential competitors an adequate number of intermediate distributors who can and will handle their goods, there manifestly is no competitive injury and no harm to the ultimate consumer."[26]

Though using *Standard Stations*' metaphor of foreclosure of commerce affected, the Attorney General's Committee specifically rejects the quantitative substantiality test and approves the approach of the Commission in *Maico*. It urges an analysis of the facts in each case "to determine whether the challenged practice menaces competition in the distribution process by actually 'foreclosing' competitors from access to a substantial share of the consuming market" (p. 144), and declares: "Whenever a seller through preempting access to consuming markets unduly restricts his rivals' opportunities to compete, the potential impairment of the competitive process or tendency to monopoly readily appears" (p. 146). "The heart of the matter is the ease with which rival suppliers can practicably secure consumer access in alternative ways" (p. 147). The Report expressly rejects the notion that foreclosure in respect of an annual volume of $500,000 of business in salt, condemned in *International Salt*,[27] or the annual replacement of 5,000 taxicabs in *Yellow Cab*,[28] or 6% of the gasoline and 2% of the batteries sold in the *Standard Stations* market, represents, as a matter of law, a substantial share of the market. "Our conception of substantiality is whether competitors in fact have ready access to adequate sources of supply and to a sufficient number of outlets to enable their products to be effectively marketed" (p. 147, n. 73).

In short, the Attorney General's Committee accepted the criticism of those who interpreted the language of the *Standard Stations* opinion as formulating a *per se* rule of invalidity. It did not quarrel with the actual decision in *Standard Station,* as the use of exclusive dealing contracts by Standard Oil's competitors

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[26] Handler, *Recent Antitrust Developments*, 9 Record 171, 183 (1954).
[27] *International Salt Co.* v. *U. S.*, 332 U. S. 392 (1947).
[28] *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218 (1947).

withdrew most of the suitable retail outlets from the smaller marketing companies. As a result, competition may possibly have been foreclosed not only quantitatively, but also qualitatively.

During the past year the Commission[29] and the lower federal courts[30] have passed upon the validity of exclusive dealing arrangements in several industries. The Commission itself continues to subscribe to the *Maico* doctrine. It is not clear, however, that its application of that doctrine provides any different results from the *Standard Stations* rule of quantitative substantiality. The Commission has forbidden arrangements in circumstances at least suggesting that competitors had fairly effective and ready access to markets.[31] Some of the Commission examiners not only apply the quantitative substantiality test but refer uncritically to the *Standard Stations* decision.[32] The Second and the Seventh Circuits have expressly and approvingly followed *Standard Stations*.[33] Even more recently the Department of Justice has instituted suit against the *Philco* corporation,[34] charging it with violating Section 3 of the Clayton Act by entering into agreements with its 130 wholesale distributors under which they are required to handle Philco products exclusively.

The *Philco* case also presents for adjudication the interesting question whether a manufacturer, as part of its control of the marketing of its products, may require its exclusive distributors to confine their sales within prescribed territories, not to compete with one another and to compel their retail accounts to sell to consumers only. Since these latter questions are intertwined with claims of improper vertical price-fixing, as in *Bausch & Lomb*,[35]

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[29] *Harley-Davidson Moto. Co.*, CCH Trade Reg. Rep. Par. 25,108 (FTC 1954); *Revlon Products Corp.*, CCH Trade Reg. Rep. Par. 25,184, 25,249 (FTC 1954); *Insto-Gas Corp.*, CCH Trade Reg. Rep. Par. 25,188 (FTC 1954).

[30] *Dictograph Products* v. *FTC*, 217 F. 2d 821 (2d Cir. 1954), cert. denied, 349 U. S. 940 (1955); *Anchor Serum Co.* v. *FTC*, 217 F. 2d 867 (7th Cir. 1954).

[31] Cf. *Revlon Products Corp.*, CCH Trade Reg. Rep. Par. 25,184, 25,249 (FTC 1954).

[32] *Beltone Hearing Aid Co.*, CCH Trade Reg. Rep. Par. 25,397 (FTC 1955).

[33] *Dictograph Products* v. *FTC*, 217 F. 2d 821 (2d Cir. 1954), cert. denied, 349 U. S. 940 (1955); *Anchor Serum Co.* v. *FTC*, 217 F. 2d 867 (7th Cir. 1954).

[34] *U. S.* v. *Philco Corp.*, Civ. 18,216 (E.D. Pa. December 15, 1954).

[35] *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944).

the Court, after trial, may never reach the naked question of the validity of vertical territorial restraints or the limitation of sales to consumers. There is not much law on either of these points, but such as there is upholds their validity.[86]

That part of the Philco complaint which relates to exclusive dealing would seem to be predicated on the quantitative substantiality rule since it is well known that there are numerous wholesale distributors handling competing lines of electronic products and appliances. Here again the Department appears to be relying in actual litigation upon theories which the Attorney General's Committee Report opposed.

It is my firm conviction that the rationale of *Standard Stations* is incorrect, that it has and will have a mischievous effect upon antitrust doctrine, and that it should be replaced with a rule which predicates illegality more realistically upon the potentially adverse effects of exclusive dealing upon competitors in the marketing of their wares. This has been a repeated thesis in my lectures; I was pleased that this view was adopted by the Attorney General's Committee. But, I must confess to considerable uneasiness as a result of the latest court decisions, recent determinations by the Commission and its staff, and the action by the Department in the *Philco* case.

IV

More encouraging have been the developments respecting intra-corporate conspiracy and conscious parallelism, topics of concern to the antitrust practitioner, with which I have dealt in

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[86] *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (2d Cir. 1942), petition for rehearing denied, 130 F. 2d 196 (2d Cir. 1942), cert. denied, 317 U. S. 695 (1943); *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. 593 (8th Cir. 1903), cert. denied, 192 U. S. 606 (1904); *General Cigar Co. Inc.*, 16 F.T.C. 537 (1932); cf. *Cole Motor Co. v. Hurst*, 228 Fed. 280, 284 (5th Cir. 1915), adhered to sub nom. *Tillar* v. *Cole Motor Car Co.*, 246 Fed. 831 (5th Cir. 1917), cert. denied, 247 U. S. 511 (1918).

Wilder Mfg. Co. v. *Corn Products Ref. Co.*, 236 U. S. 165 (1915); *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1 (7th Cir. 1949), cert. denied, 338 U. S. 948 (1950); *Fosburgh v. California & Hawaiian Sugar Refining Co.*, 291 Fed. 29 (9th Cir. 1923); cf. *P. Lorillard Co.* v. *Weingarden*, 280 Fed. 23 (W. D. N. Y. 1922); *U. S.* v. *Newbury Mfg. Co.*, 36 F. Supp. 602 (D. Mass. 1941). But see *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 721 (1944).

previous lectures. The Committee's report rejects intra-corporate conspiracy. It properly draws a distinction between conspiracies in violation of Section 1, which requires a plurality of actors for its violation, and Section 2, which may be infringed by a single person. Accordingly, a corporation and its officers may be guilty of a conspiracy to monopolize, but not of a conspiracy to restrain trade. The Committee does not believe that Section 1 should be invoked against a parent company and its subsidiaries. It states:

> "The use of subsidiaries is generally induced by normal, prudent business consideration. No social objective would be attained were subsidiaries enjoined from agreeing not to compete with each other or with their parent. To demand internal competition within and between the members of a single business unit is to invite chaos without promotion of the public welfare." (p. 34)

Somewhat illogically, however, a majority of the Committee, over a vigorous dissent, believes that a group of affiliated companies may be held to have violated Section 1 where their acts, even though falling short of an attempt to monopolize, have an undue coercive effect upon third parties.

In two recent District Court decisions, one judge, following the rulings which the Committee approves, dismissed a complaint charging a violation of Section 1 by a corporation and its officers, stating:

> "'A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.'"[37]

Another District Judge, however, dealing with the amended complaint in the same litigation, upheld a conspiracy between a corporation and its subsidiaries.[38] It would appear, though, that

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[37] *Hershel California Fruit Products Co., Inc.* v. *Hunt Foods, Inc.*, 1955 Trade Cases Par. 67,928 (N.D. Cal. 1954), quoting *Nelson Radio Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911, 914 (5th Cir. 1952), cert. denied, 345 U. S. 925 (1953).

[38] *Hershel California Fruit Products Co., Inc.* v. *Hunt Foods, Inc.*, 1955 Trade Cases Par. 68,046 (N.D. Cal. 1955).

the complaint charged a conspiracy to monopolize, as well as one in restraint of trade.

The Committee's views on conscious parallelism are that uniform action does not in itself constitute an antitrust infraction and that its probative value in establishing the ultimate conspiratorial agreement will vary case by case. It does not believe that any hard or fast rule can be formulated as to the evidentiary significance of this type of relevant evidence; the weight will depend upon the business setting in which it is found. *Theatre Enterprises*[39] held that proof of conscious parallelism does not require a finding of conspiracy.[40] It did not pass upon the question whether such evidence is sufficient to permit such a finding. In other words, it did not consider whether proof of conscious parallelism makes out a *prima facie* case of conspiracy so that the trier of the facts may infer conspiracy if it chooses to do so.

However, at least one court has construed the dictum in *Theatre Enterprises* that "*business behavior* is admissible circumstantial evidence from which the fact finder may infer agreement" as a ruling that proof of conscious parallelism, without more, is enough to warrant submission of the issue of conspiracy to the jury. In *Hathaway Motors, Inc.* v. *General Motors Corporation,*[41] Judge Smith denied a motion to dismiss a complaint in a treble damage action despite the absence of a specific allegation of concerted activity. Observing that the plaintiffs "seem to rely on 'conscious parallelism' to satisfy [the] requirement" of agreement, the court said, paraphrasing *Theatre Enterprises:* "Such business behavior is admissible circumstantial evidence from which the trier may infer agreement. The difficulties of persuading the trier to draw the inference should not cause dismissal of the complaint at this time." In short, by equating "business behavior"—

[39] *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.,* 346 U. S. 537 (1954).

[40] See *Interborough News Co.* v. *Curtis Publishing Co.,* 127 F. Supp. 286, 301 (S.D. N.Y. 1954) aff'd (2d Cir. Aug. 26, 1955) ("The mere fact that under the circumstances presented, each [defendant] knew what the others were doing and in some instances nearly contemporaneously did the same thing, does not, without more, make out an unlawful conspiracy").

[41] 1955 Trade Cases Par. 67,996 (D. Conn. 1955).

the phrase employed by the Supreme Court—with "conscious parallelism," Judge Smith in effect decided that conscious parallelism constitutes *prima facie proof of conspiracy*.

The term "business behavior," however, is much broader than "conscious parallelism," encompassing a wide variety of conduct in addition to uniform action. None of the cases cited by the Supreme Court in *Theatre Enterprises* rested its finding of conspiracy on conscious parallelism alone. *Interstate Circuit*,[42] *Masonite*,[43] *Bausch & Lomb*,[44] *American Tobacco*[45] and *Paramount*[46] all contained one or more plus factors to support the inference of conspiracy. Even the recent decision of the Fifth Circuit in *Paramount Film Distributing Corp.* v. *Applebaum*,[47] which contains some rather broad language concerning the probative value of conscious parallelism,[48] in the last analysis refrained from holding that such evidence, in and of itself, would have been enough to support a finding of conspiracy. Instead, the court placed its ruling on the ground that the record contained "sufficient evidence of 'conscious parallelism' *and other activities on the part of the distributors*" to warrant submission to the jury.[49]

No one can seriously dispute that under certain circumstances uniform action may be significant evidence of conspiracy. Under other circumstances, however, its probative value may be so slight as not to afford a rational basis for inferring that it was of any conspiratorial origin. This was squarely recognized by the Tenth Circuit in the *Hughes Tool* case[50] in reversing a finding by the

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[42] *Interstate Circuit* v. *U. S.*, 306 U. S. 208 (1939).
[43] *U. S.* v. *Masonite Corp.*, 316 U. S. 265 (1942).
[44] *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944).
[45] *American Tobacco Co.* v. *U. S.*, 328 U. S. 781 (1946).
[46] *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948).
[47] 217 F. 2d 101 (5th Cir. 1954), cert. denied, 349 U. S. 961 (1955).
[48] In holding the evidence of conspiracy insufficient as to one of the defendants, the court observed: "There is not even the vague 'conscious parallelism' and 'past proclivity toward unlawful conduct' from which a conspiracy can be inferred" (217 F. 2d at 126).
[49] 217 F. 2d at 127 (emphasis added).
[50] *Cole* v. *Hughes Tool Co.*, 215 F. 2d 924 (10th Cir. 1954), cert. denied sub nom. *Ford* v. *Hughes Tool Co.*, 348 U. S. 927 (1955).

District Court that Hughes and Reed, the only major manufacturers of rotary drilling bits, had engaged in a concerted scheme to fix prices. The finding had been based primarily on the admitted fact that whenever Hughes changed its prices, Reed promptly followed suit. The court held that such evidence of price leadership and resulting uniformity did not justify an inference of conspiracy in light of the "many examples of price changes made by competitors immediately after another competitor had changed its prices," and the proof that "it was common to find competitors having the same or similar prices for similar goods."[51] In conclusion it said: ". . . the fact that competitors may see proper, in the exercise of their own judgment, . . . to follow prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."[52]

The view that uniform action loses conspiratorial significance when shown to be reasonable was tersely expressed by Judge Yankwich,[53] and later echoed by the Ninth Circuit in *Fanchon & Marco,* as follows: "No parallelism, conscious or unconscious, can overcome a finding of reasonableness."[54] In other words, if the individual action of each of several businessmen makes economic sense, then there can be nothing suspect about the fact that all reach the same decision.

In short, the trend in the cases, with the exception of Judge Smith's decision in *Hathaway,* is to hold that proof of conscious parallelism neither warrants the direction of a verdict in favor of the plaintiff, nor requires that the case be submitted to the jury. It is relevant evidence, to be weighed with all the other proofs, in determining whether the conspiratorial agreement has been established. The questions not passed on in *Theatre Enterprises* are being answered by the courts consistently with the analysis and recommendations of the Attorney General's Committee.

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[51] 215 F. 2d at 940.
[52] 215 F. 2d at 940.
[53] *Fanchon & Marco v. Paramount Pictures,* 100 F. Supp. 84 (S.D. Cal. 1951).
[54] *Fanchon & Marco* v. *Paramount Pictures,* 215 F. 2d 167, 170 (9th Cir. 1954), cert. denied, 348 U. S. 912 (1955).

V

The most important development has been the publication of the Attorney General's Report after eighteen months of incubation. If the report has received any rave notices, none has come to my attention. However, there has been no dearth of sordid personal attack upon distinguished members of the Committee. The Committee's findings are weighty—and I refer more to its avoirdupois than to its content. I am reminded of Justice Holmes' characteristic gesture when he received proofs of the opinions of his brethren. He would place the envelope in the palm of his hand without opening it, and if he found it heavy would conclude that the author was Chief Justice White. The report maintains the antitrust tradition of bulkiness. It is an elaborate treatise, but since it is the product of many authors, its quality is not unlike a broth brewed by many cooks. Measured by pretensions which the Committee never entertained, the report has its shortcomings. Measured by the objectives which were set for it upon establishment of the Committee by the Attorney General, and which the Committee imposed upon itself, a signal contribution has been made.

The Committee's composition covers the entire antitrust spectrum. Its members were drawn from the bar, the universities and the Government. Their antitrust experience was derived from the prosecution and defense of government suits, the representation of plaintiffs and defendants in private actions, and from scholarly inquiries. The mandate of this group was to survey our antitrust laws in light of present day conditions and not those of an earlier era.

There had been widespread complaint that antitrust had been reduced to a mechanical jurisprudence of *per se* rules. The Committee carefully examined this criticism and concluded that it was ill-founded. It suggests no alteration of the pervasive doctrine of *per se* restraints save in one particular, and that has to do with the Clayton and not the Sherman Law. It regards the quantitative substantiality doctrine as essentially a *per se* rule and urges its

abandonment as the controlling canon of interpretation of Section 3.

The Committee considered whether the rule of reason had been eroded out of existence. Its conclusion is that the rule of reason is a vital force still applicable to a large area of restraints outside the *per se* classification. After a painstaking examination of the history and purposes of the antitrust laws, the Committee agrees that any arrangement producing an undue limitation on competitive conditions is inconsonant with the statutory objectives, and hence is unreasonable as a matter of law. Restraints which do not alter the competitive texture of an industry may be sustained upon a factual demonstration that they do not entail any unduly prejudicial anti-competitive effects. This is the rule of reason articulated by the Supreme Court in *Times-Picayune*.[55] It is a rule of reason of modest proportions. It is a rule of reason particularly useful in measuring novel restrictions. It is the Committee's belief that the lack of market control in the case of restraints outside the *per se* category may be determinative of legality.

I have already referred to the position taken by the Committee with respect to conscious parallelism and intra-corporate conspiracy; this probably represents its most important achievement.

The first chapter, which collates the law of Sections 1 and 2 of the Sherman Act, is a handy reference work and a useful compendium which should aid in bringing clarity and understanding to this vexing subject.

I should like to call attention, in passing, to Chapter 7 of the report entitled "Economic Indicia of Competition and Monopoly." This is a difficult section to read but one which will repay careful examination. It is a stimulating analysis of the principal economic concepts upon which our antitrust policy rests.

There is not the time to discuss in any detail the Committee's views on price discrimination. It has produced the best analysis

[55] *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594 (1953).

of that difficult subject ever written. Those who treat Robinson-Patman as a sacred cow are grievously offended by the fact that the Committee did not limit its comments to thunderous applause and a rousing vote of thanks. The Committee did not hesitate to point to the numerous ambiguities and obscurities of this unhappy law. I can only briefly enumerate those suggestions having far-reaching implications.

The Committee is not opposed to a statute condemning price discrimination. However, it believes that the outlawry of all price differences, even though they have no adverse effect on competition, is antithetical to the basic antitrust philosophy of the Sherman Act. Price in our economy is the resultant of two basic forces: horizontal competition among sellers or buyers and vertical bargaining between seller and buyer. A statute interdicting price differences eliminates bargaining as an instrument in the determination of a fair price level. Congress never intended to shackle the economy by prohibiting all price differences. It forbade only those price differences which may substantially lessen competition in the industry as a whole, which have a tendency to monopoly, or which may be injurious to competition. The Committee calls attention to the fact, long ignored, that the statute does not forbid price discriminations which injure a competitor; its prohibitions relate to injury to competition. It urges a judicial and administrative interpretation consistent with the words of the law. Whether Section 2(a) is violated does not depend upon whether the non-favored buyer sustains an injury to his pocketbook. Were that the test, all price differences would be taboo. The law is violated where the non-favored buyer is handicapped or injured in his competition, that is to say, where as a result of the discrimination he cannot effectively compete with the favored buyer.

The Committee would reconcile the proportionately equal allowances and services provisions of the statute with its price discrimination prohibitions, substituting for the mandatory requirement that they be accorded on proportionately equal terms, regardless of their effect on competition, a new requirement that

the granting or obtaining of services be unlawful only when they have the proscribed effects on competition specified in Section 2(a). This change would accommodate subsections (d) and (e) to the overriding philosophy of Section (a).

The Committee believes that the cost defense has been emasculated by the exacting conditions imposed by the Commission for precise accounting data. It feels that the cost defense should be available if there is approximate, even though not mathematically exact, cost justification.

The Committee endorses the view of the Supreme Court in the *Standard Oil of Indiana*[58] *case* upholding good faith meeting of competition as a total defense.

Robinson-Patman is a highly controversial and intricate subject. Reasonable men may well differ in respect of the Committee's analysis and recommendations. No one, however, can read the chapter without being struck by its objective and scholarly approach.

The Report takes the middle road and on balance, with its deficiencies, is a significant development in this field. The Committee's views are entitled to earnest consideration. Although the Court rulings in the past year have been of slight dimension, the debate already precipitated by the Report and the cases now pending foreshadow future legislative and judicial advances of major doctrinal import.

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[58] *Standard Oil Co.* v. *F. T. C.*, 340 U. S. 231 (1951).

Free Lawyers in Athens

By Dudley B. Bonsal

The waning rays of a warm afternoon sun bathed the magnificent ruins on the Acropolis. From where we stood, the Parthenon, Erechtheum and Propylaea still seemed a homogeneous and connected group of buildings marking the splendor that was Athens. We stood on the Pnyx, the shoulder of a neighboring hill, which in the golden age of Greece was the meeting place of a democratic people. It was here that the leaders in the time of Pericles exhorted the Athenians in the ways of democracy. It was fitting indeed that this place should have been selected for the closing ceremonies of the International Congress of Jurists, and that we should have witnessed Aeschylus' "Trial of Orestes," the legendary story of the earliest trial in history.

The ceremony on the Pnyx on June 18, 1955, concluded the five-day session of the International Congress of Jurists. Gathered together were over 100 judges and lawyers from 39 free-world countries, and nearly a score of distinguished members of the profession who are exiles from Russia's satellite nations. We met at the invitation of the International Commission of Jurists, which had been engaged for the preceding two years in documenting the system of injustice prevailing in the Communist countries. This documentation had been incorporated in a book entitled "Justice Enslaved" which was distributed to the delegates at the Congress. In addition, we heard firsthand testimony from victims of Communist justice who had been able to escape its clutches. Committees of the Congress in the fields of Public, Economic, Penal and Labor Law studied specialized materials and questioned witnesses. These committees made detailed reports at the final plenary sessions.

On the basis of these reports the administration of justice in

Editor's Note: Mr. Bonsal is the Chairman of the Association's Special Committee to Cooperate with the International Commission of Jurists and this is his report on the International Congress of Jurists which was held in Athens last June.

all of the Communist satellite nations was vigorously condemned in a series of resolutions passed unanimously by the delegates, who represented a fair cross section of the judiciary and the bar in the free world, coming as they did from Asia and Africa as well as Europe and the Americas. There were members of parliament, cabinet ministers, professors of law, judges and lawyers. The profession in India, Pakistan and Burma was represented by Justices of their Supreme Courts. Two former Presidents of the Law Society of England were on hand. The American delegation included James Grafton Rogers, Bethuel M. Webster Eli Whitney Debevoise, Ernest Angell, Charilaus G. C. Raphael and the writer, many of whom had been asked to act as observers by the American Bar Association and the Association of the Bar of the City of New York.

In its Final Resolution, the Congress called upon the International Commission to formulate a statement of principles of justice under law and to endeavor to secure their recognition by international agreement. The Commission was also called upon "to continue its efforts to illustrate the meaning of freedom and human dignity" by materials drawn dispassionately from the records of systematic injustice wherever found.

It was encouraging to the Americans present to find at the conference a common denominator among these judges and lawyers of the free world, consisting of the basic principles so clearly written into our Constitution. This common denominator is reflected in the "Act of Athens," which was unanimously adopted at the conclusion of the Congress. The "Act of Athens" is a reaffirmation of the Rule of Law and declares that it is essential to this principle that (1) the state be subject to the law; (2) governments respect the rights of individuals under the law and provide means for their enforcement; (3) judges be guided by the Rule of Law and resist all encroachments on their independence as judges; and (4) lawyers preserve the independence of the profession and insist that every accused be accorded a fair trial.

The deliberations brought out that in the fight for the preservation of individual rights and the inherent dignity of man the

Communists are the most dangerous and worst offenders, but that the lawyers of the free world should not forget that attacks on these principles may come from other quarters. The Indian delegation particularly, headed by a former secretary to Gandhi, called repeated attention to the Apartheid movement in South Africa. The delegations from Northern Europe expressed concern as to whether another systematic attack might not be taking place in Spain.

In sum, the Congress achieved significant progress in the cause of civil liberties, despite attempts by the Greek participants to use it as a sounding board for Greek political aspiration in Cyprus. The cynical pattern of Communist subversion of the law and destruction of individual rights was made very clear. Even more important, it revealed an extensive community of agreement among representative free-world lawyers on these basic issues and focused attention on the important role which the judiciary and the bar of the free world can and should play in this struggle. Finally, it enabled the International Commission of Jurists to rededicate itself to this task with the knowledge that its aims and objectives enjoy the support of distinguished leaders of the profession throughout the world.

The International Commission of Jurists had its genesis in Berlin in 1952, where it was organized by a group of jurists who had been invited to Berlin to learn about the administration of law in Communist East Germany. They had been invited by a group of devoted German lawyers under the leadership of Dr. Theo Friedenau, who at great personal risk and sacrifice had demonstrated to the world the systematic injustice prevailing in the part of their country lying behind the iron curtain. The International Commission of Jurists was organized to extend this work to other countries dominated by the Communist system, and to advance throughout the free world the legal profession's dedication to the principles of the Rule of Law.

American judges and lawyers have shown a keen interest in the work of the International Commission of Jurists. The Association of the Bar of the City of New York organized a special com-

mittee to cooperate with the Commission in its task. This committee in turn brought about the organization of the American Fund for Free Jurists, which has with substantial success solicited contributions to be applied to the work of the Commission. The American Bar Association in 1953 adopted a resolution endorsing the work of the International Commission and subsequently created a special committee under the chairmanship of Ernest Angell to enlist the active cooperation of the American Bar. With the generous assistance of James Grafton Rogers, meetings of leaders of the bar have been held in Los Angeles, San Francisco, Denver, Chicago, Philadelphia and Boston.

The promotion of the principles of justice according to law and the clear demonstration of the subversion of the law under Communism—this work is important to lawyers everywhere. Much remains to be done, but a great start has been made and the success of the International Congress of Jurists at Athens will spur the Commission to greater effort.

Marka de Lancey Revisited—A Review

By Roger Bryant Hunting

Wool gathering (an interest I have in common with certain sheep herders in the Australian "out back) one afternoon in my office, my eye fell upon the flyleaf of the dust jacket on a new mystery novel, "Innocent Bystander,"* which was stacked on my desk with other law reviews and similar publications of legal import. It said, in pertinent part:

> "The story moves with grimly increasing tempo from a nightclub in Greenwich Village to Forty-fourth Street rehearsals of the annual Bar Association show;"

As Chairman of the Association's Committee on Entertainment, which produces the Annual Association Night Show, I realized that this publication required my immediate study. Putting aside less pressing matters relating to the administration of justice, I closed my door, mixed a warm scotch and soda from emergency supplies in my desk, and immersed myself in the world of Marka de Lancey, a delectable member of the Association whose activities there in behalf of the Committee on Entertainment had thus far escaped my notice.

A feeling of uneasiness came over me as I perused the volume, brought on by a number of circumstances. It appears that Miss de Lancey had been involved in other activities of the Association, some of which are recorded in a previous novel entitled "The Corpse Died Twice,"** reviewed by Harris Steinberg in the February 1952 issue of THE RECORD. Indeed, Mr. Steinberg himself figured in that book, although the assurance was given on the flyleaf that "all scenes, characters and events portrayed in this novel are entirely imaginary." An identical disclaimer appears on the flyleaf of "Innocent Bystander." And yet—

What about this character Redding? Variously described as sententious, disagreeable, shrewd-eyed, and "twisting his ironic lips in his superior manner"—he is a functionary of the Entertainment Committee whose "attenuated figure" (I weigh 125 pounds in my wool-gathering outfit) appeared in every crucial scene. Could he be the villain of the piece? Sighing sententiously, I twisted my ironic lips in my superior manner and shrewdly eyed the novel from cover to cover at one sitting.

My uneasiness vanished as I fell thrall to the lovely Miss de Lancey—in any case it would be a pleasure to share the intimate confines of a mystery novel with her. Marka is a luscious redhead, properly deferential to judges, charming to court attendants, loyal to superannuated law clerks and a tantalizing opponent for the District Attorney's office. She lunches well at Caruso's, at

* "Innocent Bystander" by Barbara Frost, Coward-McCann, 184 pp. $2.75.

** "The Corpse Died Twice" by Barbara Frost, Coward-McCann, 186 pp. $2.50.

Gasner's, at Antica Roma. She writes briefs, tries cases, confers with clients, and, in a deep scoop neckline, is "curved in the right places and how." To top it all, she does the choreography for the Bar Association Show, fills in the chorus in an emergency, finds a corpse, and—while the jury is still out, about to convict her client—personally solves the mystery and traps the killer.

Lawyers who enjoy mystery stories with accurate and believable legal background will find this one to their taste. The pleasure of following the development of the story is sharpened in the familiar surroundings of the House of the Association and Foley Square and its environs. The legal device upon which the story is hung is clever and plausible. It brings still another facet of the rule against perpetuities into view. All in all, members of the Association who are tempted to enter the rather overcrowded ranks of wool gatherers, will do much better to spend a pleasant evening with Marka de Lancey—who never once in the course of events thinks to herself, "had I but known."

As I replaced the book in the file and diluted my drink wth the remainder of the scotch, I again twisted my ironic lips in my superior manner. I had solved a mystery which had escaped Marka herself. Poor Redding.

This unfortunate man is more to be pitied than censured. He is charged with the duty of producing and directing a show from a poverty of talent and material that would embarass an annual Sunday school pageant in Secaucus, New Jersey. With little or no assistance he must construct entertainment from a series of skits and musical numbers which rely almost exclusively on choruses made up, alternatively, of twenty corporation lawyers, or fourteen judges, and which reaches its zenith of comic inventiveness in a mass rendition of a Gilbert and Sullivan parody "We've got a little list." Disagreeable? Good grief Marka, the twisting of poor Redding's lips is the result of his efforts to conceal an inner agony which no man should be called upon to bear.

There is an answer. Marka, join the Entertainment Committee. Give it your time, your talent, your glamour, your all. I'm sure that when you really get to know poor Redding, when you see the soul searing problems with which he grapples, you'll take a more charitable view. Marka, there is a vacancy on the Committee, could you see your way clear?

The Library

SIDNEY B. HILL, *Librarian*

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If language is not correct, then what is said is not what is meant; if what is said is not what is meant, then what ought to be done remains undone; if this remains undone, morals and arts will deteriorate; if morals and arts deteriorate, then justice will go astray; if justice goes astray, the people will stand about in helpless confusion. Hence there must be no arbitrariness in what is said. This matters above everything.

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